

Revised September 5, 2012

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

SECTION 407 INQUIRY

Docket No. PI2012-1

**REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE  
(ERRATA)**  
(August 31, 2012)

The United States Postal Service (Postal Service) hereby submits reply comments in response to Postal Regulatory Commission (Commission) Order No. 1420, Notice Providing Opportunity to Comment on Development of Commission Views Pursuant to 39 U.S.C. § 407(c)(1) (July 31, 2012) as provided by Order No. 1451, Order Allowing For Reply Comments (August 28, 2012).

**I. Overview**

In response to Order No. 1420, the Commission received timely comments from the Public Representative and five parties: IMX Italy, the International Mailers' Advisory Group, Federal Express Corporation (FedEx), Nordic Postal Operators and James Campbell. The American Council of Life Insurers, the Coalition of Services Industries, and the U.S. Chamber of Commerce (collectively ACLI) jointly filed late comments on August 29, 2012. The Postal Service will first address these comments by primary topic and will then address remaining comments by individual party.

**A. Antitrust and Effect on the Market**

Mr. Campbell and FedEx both argue that the UPU terminal dues system constitutes unlawful collusion and price fixing in violation of the antitrust laws of the United States.<sup>1</sup> What these arguments fail to grasp, however, is that the terminal dues rates are set internationally by the UPU with the involvement of the State Department as representative of the U.S. government. While the Postal Service must fulfill the obligations of the UPU Acts, the Postal Service has no independent authority to set foreign policy, including with respect to the establishment of terminal dues under the UPU Acts. The Postal Service's adherence to the UPU terminal dues policy is a function not of its own discretion, but of its designation as the postal operator responsible for fulfilling obligations agreed to by the United States government. Thus, the arguments fall flat.

It is also important to highlight that the antitrust arguments that both FedEx and Mr. Campbell raise are limited to inbound international mail outside the scope of the so-called "letter monopoly." Inbound international mail, to the extent that it qualifies as a "letter" within the scope of the Private Express Statutes,<sup>2</sup> is included in the postal monopoly. Congress has excluded such mail from antitrust consideration.<sup>3</sup>

The general assumption is that cost coverage for inbound letter post increases as item weight increases. As such, to the extent that the concerns arise in lightweight

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<sup>1</sup> FedEx Comments at 13-14; Campbell Comments at 68. Except where context indicates otherwise, references to "terminal dues" throughout these Reply Comments apply to inward land rates as well.

<sup>2</sup> 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601 et seq.

<sup>3</sup> 39 U.S.C. § 409(e)(1).

letters within the scope of the letter monopoly,<sup>4</sup> those concerns are outside the scope of section 409(e)(1);<sup>5</sup> to the extent that the concerns arise with heavier weight letter post, there is generally adequate cost coverage for those items. Accordingly, claims of unfair competition in violation of antitrust laws are negated, as the Postal Service is able to cover its costs for those products that are outside the postal monopoly.

Mr. Campbell and FedEx further base their antitrust allegations on an understanding that the postal operators designated to fulfill the UPU Acts compete with each other, but Mr. Campbell and FedEx do not demonstrate that designated postal operators are actual or potential competitors. Nor do they explain how the UPU terminal dues system restricts competition among designated postal operators. The UPU terminal dues system applies to the exchange of volume from one designated operator to another, and thus addresses designated operators' vertical relationship, rather than their horizontal, or competitive, relationship. If a designated operator seeks to compete with another designated operator, then the UPU terminal dues system will not restrict this competition or apply to competing products or services offered outside of the UPU-regulated international mail system. Mr. Campbell and FedEx make an inaccurate and unproven assumption that the UPU terminal dues system concerns a competitive relationship among designated operators, when in reality the UPU terminal dues system addresses designated operators' vertical relationship.

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<sup>4</sup> Such as letters weighing less than 12.5 ounces. 39 U.S.C. § 601(b)(2).

<sup>5</sup> Unless otherwise indicated, references to "section" refer to the corresponding provision of Title 39, United States Code.

FedEx and Mr. Campbell also argue that the UPU terminal dues system results in unfair competition because, generally, private third parties are not permitted to enter international shipments into the mailstream of a country using terminal dues rates.<sup>6</sup> This argument fails to address the fundamental difference between designated postal operators and third party shipping companies: namely, the reciprocal treatment that the UPU Acts require designated operators to **afford to** one another. Presumably, FedEx and Mr. Campbell are asking for private parties to be allowed to benefit from the terminal dues system without accepting full responsibility for execution of the Acts, which include the reciprocal obligation to accept and deliver mail submitted under UPU documentation in exchange for the applicable terminal dues. Designated postal operators are tasked with delivering inbound international mail received from other countries under the terminal dues system, and in return for that obligation, they tender outbound international mail at set terminal dues rates. Third party shippers, such as consolidators or extraterritorial offices of exchange (ETOE), operate under no such requirement of reciprocity.

Consolidators and ETOEs thus cannot have it both ways; they cannot choose to participate in the UPU system only where it is self-serving. The combination of terminal dues and the commitment to accept and deliver all volume submitted in accordance with UPU requirements creates efficiencies, including the creation of an international delivery network with reduced transaction costs. Consumers receive a benefit from these efficiencies in the form of lower prices. Mr. Campbell and FedEx

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<sup>6</sup> FedEx Comments at 13-14; Campbell Comments at 67.

seek to free-ride on the efforts of the UPU members by enjoying the benefits of the terminal dues system where it serves their self-interest, without adhering to the service obligations that facilitate the efficiencies created by the UPU. Based on the position they have taken in this docket, it appears that Mr. Campbell and FedEx fail to recognize the efficiencies created by the UPU, and the importance of both the terminal dues system and the service obligations in the realization of these efficiencies. The argument that postal operators are somehow unfairly competing within the market fails when the alternative presented by FedEx and Mr. Campbell is taken to its logical conclusion.

Mr. Campbell and FedEx also argue that the POC Proposals fail to encourage a distinction between governmental and operational responsibilities, which they believe would result in unnecessary government interference.<sup>7</sup> This policy argument provides no assistance to the Commission in this docket and is counter to the requirements of section 407. Subsection 407(b) states that the State Department has the primary role in developing, negotiating and instituting postal policy at the international level. Subsection 407(c) further explains that the role of the Commission is to present its view on relevant proposals and whether such proposed rates and classifications are consistent with the standards and criteria established by the Commission under section 3622. Congress has established the framework upon which international postal policies are developed and how those policies will affect postal rates and classifications. While it appears that Mr. Campbell disagrees with

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<sup>7</sup> FedEx Comments at 10-12; Campbell Comments at 55-56.

this approach, it is neither his role, nor that of the Commission, to alter Congressional mandates on how **international** policies and rates are determined. The Commission should not be distracted by these irrelevant policy arguments.

## **B. Cost Coverage**

Both FedEx and Mr. Campbell assert that the current terminal dues system does not permit the Postal Service to cover its costs of inbound letter post and thus violates the requirement of section 3622(c)(2) that each class of mail cover its direct and indirect costs.<sup>8</sup> As the Commission recently highlighted in its Order No. 1427, numerous factors are involved in the analysis of cost coverage for a mail class.<sup>9</sup> The most important factor for the terminal dues issue is “failure of the Postal Service to address the shortfall by rate increases, cost decreases, or a combination thereof, despite the capability to do so.”<sup>10</sup> As described above, terminal dues rates are set by the UPU, and the United States is but one voting member at the UPU Congress. As such, the setting of terminal dues rates is beyond the control of the Postal Service and the United States government as a whole. Accordingly, the Commission should recognize the Postal Service’s lack of capability to set terminal dues rates as a significant factor in evaluating issues of cost coverage.<sup>11</sup>

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<sup>8</sup> FedEx Comments at 7-8; Campbell Comments at 46-47.

<sup>9</sup> Order No. 1427 at 9.

<sup>10</sup> *Id.*

<sup>11</sup> To the extent that terminal dues for inbound letter post are related to domestic letter postage, that benchmark is hindered from rising precipitously because of a policy decision by Congress, not the Postal Service, the Department of State, or the UPU. 39 U.S.C. § 3622(d)(1)(A).

Mr. Campbell's argument about cost coverage for inbound letter post also fails to acknowledge the relationship between the rates received for inbound international mail and the costs charged for outbound international mail. While Mr. Campbell is correct that the costs to the Postal Service for outbound international mail are outside the purview of the Commission for its 407(c)(1) analysis, the Commission still must understand the reciprocal relationship between inbound rates and outbound costs for international mail in order to understand what is at stake. As both are based on the same terminal dues system, the dynamics of reciprocity compel that a change in the terminal dues system will have proportional effects on both inbound and outbound international letter post. To ignore this relationship and the effect of eliminating the terminal dues cap on both inbound and outbound international letter post could have serious, deleterious effects on both mailers' and the Postal Service's finances.

The Public Representative<sup>12</sup> also highlights the terminal dues issue by explaining how terminal dues have been addressed by the Commission in Annual Compliance Determination Reports (ACDs) since FY 2007.<sup>13</sup> As the Public Representative explains, the Postal Service's cost coverage for inbound letter post has consistently increased over the past four years.<sup>14</sup> In addition, the Postal Service has entered into several bilateral agreements with foreign postal operators to further

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<sup>12</sup> The Public Representative also expresses his concern that the Commission did not disclose the details of the subject matter on which it sought comments, and in doing so stated that the State Department may have been soliciting comments on the more than 400 proposals before the 2012 UPU Congress. It is important to highlight again that the Commission's review is limited to those proposals that establish rates and classifications for market-dominant products, not the entire scope of proposals before the 2012 UPU Congress.

<sup>13</sup> Public Representative Comments at 2.

increase its cost coverage for inbound letter post.<sup>15</sup> Order No. 1427 states that one factor to consider when evaluating section 101(d)'s protections is "evidence that the cost coverage shortfall was likely to increase further." Order No. 1427 at 9. The trend described by the Public Representative actually shows that the opposite is true: cost coverage has been moving closer to 100 percent, and the Commission should not alter this trend.<sup>16</sup>

Furthermore, Proposals 37, 20.27.1, 20.28.1 and 20.29.1 submitted to Congress by the Postal Operations Council (POC) in coordination with the Council of Administration (CA), essentially will better enable the Postal Service to continue to gradually increase its overall cost coverage for inbound letter post. The measured increases over time in terminal dues rates will also allow the Postal Service to continue the trend of increasing its cost coverage for inbound letter post while bettering the Postal Service's finances as a whole. Together, the POC Proposals, in conjunction with the increased use of bilateral agreements, are the most appropriate method for the Postal Service to reach 100 percent cost coverage.

### **C. Undue and Unreasonable Discrimination**

Mr. Campbell argues that the current terminal dues system unfairly discriminates against certain mailers in violation of section 403(c) of title 39.<sup>17</sup> Section 403(c) provides that the Postal Service shall not "make any undue or

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<sup>14</sup> *Id.* at 2-3.

<sup>15</sup> See, e.g., Docket No. R2011-7, Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement.

<sup>16</sup> Public Representative Comments at 2-3.



unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user” (emphasis added). FedEx follows Mr. Campbell’s argument with its own twist, challenging the current terminal dues system as creating rates that are unjust and unreasonable in violation of the objectives of section 3622(b)(8).<sup>18</sup> Without citing any support for its purported standard, FedEx claims that “[i]t is clear that the terminal dues . . . rate system presently created under the auspices of the UPU does not produce rates that are ‘just and reasonable.’”<sup>19</sup>

### **1. Market-Dominant Rates Set by International Agreement Are Not Subject to “Undue or Unreasonable Preferences” Prohibition**

As an initial matter, 39 U.S.C. § 403(c) is inapplicable in this context. That provision concerns the Postal Service’s “establish[ment of] classifications, rates, and fees under this title.” However, terminal dues are not established under guidelines set forth in title 39, but under an international convention. Moreover, the Postal Service does not establish terminal dues: the Universal Postal Union does, and the State Department represents the United States’ interests in that context. As such, terminal dues are outside the scope of 39 U.S.C. § 403(c).

Even if Congress had left that provision general enough to imply coverage of all rates ultimately charged by the Postal Service (regardless of whether they were also established by the Postal Service), 39 U.S.C. § 403(c) would give way to the more specific provision on treaty-established rates in 39 U.S.C. § 407(b)(1). It is

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<sup>17</sup> Campbell Comments 51-52.

<sup>18</sup> FedEx Comments at 10.

<sup>19</sup> *Id.*

well-established that a more specific legislative provision prevails over a more general one with which it conflicts.<sup>20</sup> In this case, a provision concerning discriminatory effects of postal rates set by international agreement would be more specific than, and therefore would prevail over, a hypothetical provision concerning discriminatory effects of any postal rates.

Given that 39 U.S.C. § 407(b)(1) is the provision relevant to international mail rates established by the UPU Acts, it is significant that Congress limited that provision's effect to undue or unreasonable preferences with respect to competitive products. If Congress had intended to include preferences with respect to market-dominant products or any postal product, Congress could have so provided, yet it did not do so.<sup>21</sup> This reinforces the point that 39 U.S.C. § 403(c) does not apply to postal rates set by international agreement, as such a sweeping interpretation would render superfluous Congress's exclusive concern with competitive products in 39 U.S.C. § 407(b)(1), a construction that would have to be discarded as illegitimate.<sup>22</sup>

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<sup>20</sup> *E.g.*, *In re Baker*, 430 F.3d 858, 860 (7th Cir. 2005); *Craighead Elec. Co-op Corp. v. City Water & Light Plant of Jonesboro, Ark.*, 278 F.3d 859, 861 (8th Cir. 2002); *Wash. Water Power Co. v. FERC*, 775 F.2d 305, 323 (D.C. Cir. 1985).

<sup>21</sup> *See D.C. Fin. Responsibility & Mgmt. Auth. v. Concerned Senior Citizens of Roosevelt Tenant Ass'n, Inc.*, 129 F. Supp. 2d 13, 16 (D.D.C. 2000) ("One of the most firmly established canons of interpretation is *expressio unius est exclusio alterius* [*sic*], that is, the expression of one is the exclusion of the other. As far back as 1803, Chief Justice Marshall recognized that '[a]ffirmative words are often, in their operation, negative of other objects than those affirmed.' *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).").

<sup>22</sup> *See Bilski v. Kappos*, 130 S.Ct. 3218, 3229 (2010) ("A conclusion that business methods are not patentable in any circumstances would render [35 U.S.C.] § 273 meaningless. This would violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous."). The Commission itself relied on this reasoning when it decided that inbound international market-dominant mail should be classified as "products". Order No. 43, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, PRC Docket No. RM2007-1 (Oct. 29, 2007), at ¶ 3012 & fn.37 (citing 2A Sutherland Statutory Construction § 47.21 (7th ed. 2007)).

While Congress expressed policy concern for, and prohibited, undue and unreasonable preferences with respect to (1) rates and classifications established by the Postal Service under Title 39 and (2) competitive products in connection with international agreements concluded by the Secretary of State, it did not express a similar policy concern for unreasonable preferences with respect to market-dominant products in connection with international agreements concluded by the Secretary of State. Whatever one might speculate about Congress's reasoning,<sup>23</sup> the fact remains Congress manifested its intent that international agreements concluded by the Secretary of State on market-dominant products should not be dogged with complaints of discrimination. To the extent that Mr. Campbell, FedEx, or any other party is concerned about any undue or unreasonable preferences that the UPU Acts allegedly create for competitive products, such concerns are outside the scope of the Commission's limited role under 39 U.S.C. § 407(c)(1).

## **2. Any Discrimination or Preference Created by the Terminal Dues System Is Not "Undue or Unreasonable"**

While non-postal entities might have to pay market-dominant rates to the Postal Service that are different from terminal dues, such disparities are not beyond the scope of what might be deemed "just and reasonable" under 39 U.S.C. § 3622(b)(8).<sup>24</sup> As explained in the Postal Service's initial comments, the terminal

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<sup>23</sup> *Bilski*, 130 S.Ct. at 3230 ("This principle [that one statutory provision should not be interpreted in a manner that would render another provision superfluous], of course, applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times. This established rule of statutory interpretation cannot be overcome by judicial speculation as to the subjective intent of various legislators in enacting the subsequent provision." (citation omitted)).

<sup>24</sup> Of course, 39 U.S.C. § 407(c)(1) only charges the Commission with presenting its views on the consistency of rates and classifications with the standards and criteria established by the Commission

dues system creates a measured and predictable rate structure for postal operators to offer the reciprocal exchange of international letter post mail.

The previous section highlights that neither 39 U.S.C. § 403(c) nor 39 U.S.C. § 407(b)(1) applies in the terminal dues context. FedEx, however, also invokes the “just and reasonable schedule for rates and classifications” language in 39 U.S.C. § 3622(b)(8).<sup>25</sup> To the extent that one might look to 39 U.S.C. § 403(c) for interpretive guidance on this provision (as FedEx appears inclined to do), however, federal courts have tended to give the Postal Service “broad latitude” when charged with undue or unreasonable discrimination.<sup>26</sup> The reasonableness test has been framed as a two-step inquiry: the goal must be “legitimate” and the distinctions must be “rationally related to the achievement of that goal.”<sup>27</sup> At least one court has found this test to be satisfied where the Postal Service provided “valid reasons” and “a logical and

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under 39 U.S.C. § 3622. Contrary to FedEx’s apparent belief, the Commission’s task is not to evaluate consistency with the objectives and factors of the statute itself. The Commission’s standards and criteria in 39 C.F.R. Part 3010 do not expressly incorporate a “just and reasonable” requirement, although they do reference some consideration of the statute’s numerous objectives and factors.

<sup>25</sup> FedEx Comments at 10.

<sup>26</sup> *UPS Worldwide Forwarding, Inc. v. USPS*, 66 F.3d 621, 634-35 (3d Cir. 1995) (“[T]he ‘undue or unreasonable’ language, twice repeated in § 403(c), means that reasonable discrimination and preferences among users of the mail are permitted[.]”); *Mail Order Ass’n of Am. v. USPS*, 2 F.3d 408, 436-37 (D.C. Cir. 1983) (holding that, although the Postal Rate Commission’s refusal to adopt a “zoned” second-class mail rate “appears unsupported by any cost principle,” the decision was supported by “valid reasons” and therefore did not violate 39 U.S.C. § 403(c)); *Aimes Publ’ns, Inc. v. USPS*, Civ. A. No. 86-1434, 1988 WL 19618, at \*6 & \*7 n.13 (D.D.C. Feb. 23, 1988) (holding that USPS enforcement of second-class statutory rules, while “at best, uneven,” was entitled to “broad discretion” and therefore did not violate 39 U.S.C. § 403(c)); *Egger v. USPS*, 436 F. Supp. 138, 142 (W.D. Va. 1977) (“While it is obvious that [§ 407(c)] prohibits undue or unreasonable discrimination among users in the provision of delivery services, it is also equally obvious that the Postal Service may provide different levels of delivery service to different groups of mail users so long as the distinctions are reasonable.”).

<sup>27</sup> *Egger*, 436 F. Supp. at 142; *see also Ludwig v. Wolff*, 492 F. Supp. 1048, 1049 (S.D. Tex. 1980) (finding no violation of 39 U.S.C. § 403(c) where “the distinctions made by the regulations are reasonably related to the effectuation of the pertinent [statutory] objectives”).

reasonable explanation for [its] business decision.”<sup>28</sup> Assuming that the “fair and reasonable schedule for rates and classifications” provision offers a basis to scrutinize terminal dues for undue or unreasonable discrimination, this analysis would permit distinctions in terminal dues rates and postage rates offered to private customers, so long as those distinctions are based on, or at least reasonably related to, a legitimate justification.

The UPU is no mere network of businesses with contractual relationships, each of which might as well be substitutable with a private mailer or delivery provider. Rather, it is a treaty system established to harmonize rules for the exchange of items within the scope of nationally designated operators’ universal service obligations. Such obligations impose burdens that private mailers and delivery providers do not have to bear, such as the duty to provide universal service to all users across the entire country, even where the postal operator incurs a loss in doing so. As explained above, neither domestic postal customers nor international consolidators – with whom Mr. Campbell and FedEx would have the Commission place designated postal operators on equal footing – receive and deliver mail from all other countries and deliver such mail throughout the U.S. territory at a loss. Consolidators and bulk mailers represent only major commercial customers, not all citizens of foreign countries. Such companies do not provide the reciprocal universal service that the Postal Service and other designated operators must provide. It is absurd to view terminal dues through the myopic lens of direct customers, without also accounting

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<sup>28</sup> *UPS Worldwide*, 66 F.3d at 634.

for the complex reciprocal burdens and obligations with which UPU-established rates are interwoven.

Private Postal Service customers differ in at least four ways from the universal service providers that tender inbound international mail:

- (1) Unlike postal operators that must fulfill universal service obligations, private consolidators and bulk mailers are created to generate profits without regard to universal service obligations, other domestic legislative mandates, or the universal service provisions of the UPU Acts. Consolidators and bulk mailers are free to target only the most lucrative markets (“cream-skimming”).
- (2) Universal service providers must offer reciprocity to their counterparts in the UPU so as to fulfill the Convention’s aim of creating a single postal territory. Private mailers do not routinely engage with the Postal Service or other postal operators on the basis of reciprocal delivery service; they can offer unidirectional service to their end users without having to carry reverse traffic at a loss.
- (3) Universal service providers must maintain very different network structures to support universal service. For example, they must maintain large post office networks throughout their territories and usually offer universal delivery service to all delivery points according to a fixed schedule. Private consolidators and bulk mailers, however, are not designed to serve individual (single-piece) customers or offer network delivery services, and they therefore can operate with comparatively negligible infrastructure expense.
- (4) Postal operators and private customers differ in regard to their customer bases. Postal operators carry and deliver single-piece mail, including letters, parcels, and printed matter, as well as bulk mail. By contrast, consolidators and bulk mailers cater primarily to large business customers: a more cost-effective strategy than handling single-piece mail.

FedEx’s charges recall a similar colloquy in Docket No. RM2007-1. In that proceeding, FedEx complained that postal operators’ exclusive access to customs documentation established by the UPU Acts ran afoul of the “customs parity”

provision in 39 U.S.C. § 407(e). Many of the factors justifying disparate treatment in that context apply equally to postal operators' exclusive access to terminal dues:

The Postal Service submits that postal traffic is unique and not "similar" to private-sector traffic. The Postal Service's existing international services differ from comparable offerings by private sector providers in several key respects. For both historical and practical reasons, in the United States and abroad, different customs procedures are currently applied in connection with postal articles compared to those carried by private operations.

First, Postal Service and private carrier services differ based on user and recipient characteristics. Private sector shipments are usually sent by sophisticated, commercial customers with whom private carriers have a continuing relationship because the customers are repeat users. By contrast, users of Postal Service international services tend to be individual, household consumers in several key product segments. Second, the nature of the traffic that foreign posts tender to the Postal Service differs from the traffic carried by private carriers, which normally carry larger volume and higher value consignments. Third, Postal Service products offer customers different features than those of private express carriers. With the exception of GXG service, Postal Service products do not offer customers the same type of speed in clearance. Fourth, the Postal Service's implementation of the Universal Postal Union (UPU) Acts also serves as a key distinguishing feature. The United States has agreed as a member of the UPU to provide certain basic letter post services, and the United States has historically met that obligation through the Postal Service's implementation of the UPU Acts. Private sector operators have no such obligation, thereby distinguishing Postal Service traffic.<sup>29</sup>

The Postal Service went on to discuss a North American Free Trade Agreement arbitral tribunal ruling to the same effect. Although many of the ruling's points relate strictly to the customs context,

[t]he tribunal also relied on distinctions offered by customs and postal experts from the World Customs Organization and Universal Postal Union. These distinctions included the observations that "most postal

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<sup>29</sup> Reply Comments of the United States Postal Service in Response to Order No. 26, PRC Docket No. RM2007-1 (Oct. 9, 2007), at 66-67 (footnotes omitted).

traffic is private person-to-person or business-to-person while express carriers, on the other hand, deal very largely with business-to-business consignments,” and that postal operators’ universal service obligations and other commitments do not permit them to refuse consignments.<sup>30</sup>

The UPU system is designed not merely to create competitive alternatives to private enterprises, but also to promote social goals. Even the structure of 39 U.S.C. § 407(a) emphasizes cultural and social considerations in parallel with, if not above, economic ones.<sup>31</sup> As evidenced by the service obligations discussed below, as well as programs such as the Quality of Service Fund, preferential terminal dues rates for developing countries, and the allowance for postal monopolies, the UPU system is designed not merely to facilitate commerce, but rather to ensure universal human interests in international communication. In the long term, incremental movement toward policies that place greater emphasis on postal operator/commercial competition – such as an economical, cost-based terminal dues system – might further the same ends. In the short term, however, economic liberalization must be reconciled against the predominantly social and cultural aims of the UPU system.

In sum, foreign postal operators and private Postal Service customers differ substantially in their obligations, burdens, purposes, economic opportunities, and reciprocal or unidirectional relationship to the Postal Service. Therefore, there are “valid reasons” to treat inbound international mail differently from mail tendered

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<sup>30</sup> *Id.* at 68 (footnotes omitted) (citing *United Parcel Serv. of Am., Inc. v. Canada*, ICSID Case No. \_\_\_, Award on the Merits, ¶¶ 104-16 (May 24, 2007), 46 I.L.M. 922 (2007), [www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MeritsAward24May2007.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MeritsAward24May2007.pdf)).

<sup>31</sup> See 39 U.S.C. § 407(a)(1) (“It is the policy of the United States to promote and encourage communications between peoples by efficient operation of international postal services and other international delivery services for cultural, social, and economic purposes[.]” (emphasis added)).



directly by consolidators, mailers, and other non-designated operator entities.

Sustained efforts to recognize this distinction before the UPU are “rationally related” to these reasons. While terminal dues rates provide different rates for certain inbound international mail products, these different rates are not manifestly unfair or unreasonable.

**D. The Commission Is Not Obligated to Provide a Comprehensive Hearing as Mr. Campbell Proposes**

Mr. Campbell concludes his comments by suggesting that because of the limited time before the 2012 UPU Congress, the Commission is unable to provide its views within the framework of the Administrative Procedure Act (APA) and the State Department is thus unable to form a position.<sup>32</sup> This argument, however, reads into paragraph 407(c)(1) requirements and procedures that are not present. Paragraph 407(c)(1) only requires that the Commission present its views to the State Department. The Commission chose, on its own accord, to solicit input from the public to aid in guiding its views. Nevertheless, paragraph 407(c)(1) neither implicates the APA nor otherwise requires the solicitation of comments, a hearing, or a written decision.<sup>33</sup> While Mr. Campbell may advocate for a forum in which the Commission entertains the issues he has presented, this docket is not that forum. The Commission has ample time and ability to formulate its views and present them

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<sup>32</sup> Campbell Comments at 77.

<sup>33</sup> When Congress intends to implicate the APA, it expressly provides for it, such as in sections 503 or 504(g)(3)(A), which address rulemaking and drafting regulations. Section 407, which merely requires the Commission to provide its views to another agency’s deliberative process, does not implicate rulemaking and does not contain an APA-compliance requirement.

to the State Department in order for it to finalize the United States' position at the 2012 UPU Congress.

## **E. Additional Comments by Individual Parties**

### **1. IMAG**

IMAG filed comments in support of the POC Proposals and opposing Proposal 81. In essence, IMAG supported the Postal Service's position that eliminating the cap on terminal dues would result in rate shock for outbound international mailers and would paralyze the industry. Increased rates as a result of elimination of the cap on terminal dues would have a devastating impact on the mailing community. Measured and predictable increases in terminal dues rates, as advocated in the POC Proposals, provides IMAG members and the mailing industry as a whole a predictable framework within which to continue building their businesses. The Postal Service fully shares IMAG's concerns and urges the Commission to support the POC Proposals and protect the international mailing community.

### **2. Nordic Postal Operators**

The Nordic Postal Operators begin their argument by acknowledging that they are providing no "comment on relevant US [sic] regulation" and whether the proposals before the Commission are consistent with standards and criteria established by the Commission pursuant to section 3622 of title 39 as required by **paragraph** 407(c)(1).<sup>34</sup> Instead, they proceed to use their comments merely to rehash the arguments that were presented to and rejected by the POC and CA

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<sup>34</sup> Nordic Postal Operators Comments at 1.

regarding terminal dues. In Order No. 1420, the Commission sought comments on how it should proceed in forming its paragraph 407(c)(1) views about proposals before the 2012 UPU Congress. The Nordic Postal Operators' presentation of their positions without providing any evidence or arguments regarding the Commission's role under paragraph 407(c)(1) is unhelpful and outside the scope of this docket.

The Nordic Postal Operators also present arguments that the current and proposed UPU Conventions regarding terminal dues are inconsistent with European laws.<sup>35</sup> This analysis is wholly irrelevant to the Commission's task of evaluating the proposals as they relate to U.S. law, and the legal opinion of Professor Damien Geradin presented by the Nordic Postal Operators provides no insight useful to the Commission's statutory role.

Despite the lack of relevance in the Nordic Postal Operators' comments, the Postal Service believes it important to address two points: the rigidity of the terminal dues system<sup>36</sup> and the impact on the Nordic Postal Operators.<sup>37</sup> The Nordic Postal Operators claim that the POC Proposals create a system which is inflexible to changes in the market. This is simply untrue. Measured increases of the terminal dues cap and floor over the next four years are included in the POC Proposals and these increases permit postal operators to adjust their terminal dues rates as economic conditions change. The supposed risk identified by the Nordic Postal Operators that rates will continue beyond 2018 is also unsupported. Proposal 37,

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<sup>35</sup> *Id.* at 2-3

<sup>36</sup> *Id.* at 3.

which addresses terminal dues beyond 2017, requires the POC and CA to gather more information and present additional proposals at the 2016 UPU Congress. The results of studies and changing economic conditions, as well as developments in the legal landscape, will help mold those proposals.

With respect to the Nordic Postal Operators' arguments regarding the impact on high cost postal operators such as themselves, the Commission has no role in creating a system to best support foreign postal operators. The Postal Service, with the State Department and the Commission, collaborated with other members of subordinate UPU bodies to develop a terminal dues system that is a reasonable compromise for the upcoming Convention cycle. At the same time, the Nordic Postal Operators and their governments advocated positions more advantageous to their interests. The UPU is the proper venue for those discussions and debates, and the Nordic Postal Operators' attempt to pursue their interests in a U.S. domestic forum is misplaced and nonresponsive to this docket. As such, the Commission should afford no weight to the comments of the Nordic Postal Operators.

### **3. IMX Italy**

IMX Italy, a private company that serves as a third-party operator in many European countries and acts as an ETOE for some foreign postal operators, filed comments unrelated to the Commission's section 407 review. IMX Italy's comments, instead, focused on its 2007 request to the Postal Service to deliver items tendered

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<sup>37</sup> *Id.* at 4.

by IMX Italy to the Postal Service at UPU terminal dues rates.<sup>38</sup> The Commission, pursuant to paragraph 407(c)(1) only is to express its view with respect to whether a proposal is consistent with the standards and criteria of section 3622. Furthermore, a State Department policy statement dated February 16, 2011 provides that inbound shipments from ETOEs “must be mailed as domestic U.S. mail charged at domestic U.S. postage rates.”<sup>39</sup> As such, IMX Italy’s claims of “discrimination” are outside the scope of the Commission’s review and, therefore, are irrelevant to this docket. The Commission should give no weight to its comments.

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<sup>38</sup> IMX Comments at 2.

<sup>39</sup> U.S. Policy Toward Extraterritorial Offices of Exchange available at <http://www.state.gov/p/io/ipp/65178.htm>.

#### **4. ACLI**

ACLI, in its comments, espouses its general position against government operated enterprises, including the Postal Service, and requests that the Commission work to reign in what it views as improper governmental interference.<sup>40</sup>

Nevertheless, ACLI, like the Nordic Postal Operators and IMX Italy, fails to provide any legal arguments to help guide the Commission in its subsection 407(c) analysis. These comments have no bearing on the development of the Commission's view regarding terminal dues presented to the 2012 UPU Congress.

#### **II. Conclusion**

The Commission is tasked with providing its view as to whether certain proposals that affect market dominant products are consistent with the standards and criteria of section 3622. The CA/POC Proposals advance the objectives of section 3622(b) while satisfying the factors of 3622(c), while Proposal 81 or other amendments to remove cap rates are counter to these requirements. Accordingly, the Postal Service recommends that the Commission present a view to the State Department endorsing the proposals submitted by the CA and POC as they best satisfy the statutory requirements of title 39 and best effectuate the policies, objectives and factors in 39 U.S.C. § 3622.

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<sup>40</sup> ACLI Comments at 2-3.

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Respectfully submitted,

UNITED STATES POSTAL SERVICE

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